

**Before the
WIRELINE COMPETITION BUREAU
of the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of Request for Review by)	CC Docket No. 96-45
)	
ABS-CBN Telecom)	
North America, Incorporated)	
Filer ID 815865)	File No.
)	
of Decision of Universal Service Administrator)	
Pursuant to Rule 54.719(c))	

STATEMENT OF INTEREST

In accordance with the Commission's Rules, 47 C.F.R. 54.720(a), ABS-CBN Telecom North America, Incorporated ("ABS"), FCC Filer 499 ID 815865, by its attorneys, files this Request for Review of the Universal Service Administrative Company's ("USAC") September 13, 2004 decision regarding ABS' contribution appeal. *See* "Administrator's Decision on Contributor Appeal," September 13, 2004 (attached hereto at Exhibit A)¹. USAC's rejection of ABS' revised fourth quarter 2003 Telecommunications Reporting Worksheet (Form 499-Q), dated October 30, 2003 has caused ABS irreparable harm. Therefore, ABS seeks a review of the USAC decision.

INTRODUCTORY STATEMENT OF FACTS

1. ABS is a small telecommunications reseller of interstate and international long distance telephone service. It started providing telecommunications services to U.S. customers in 1997.

¹ *See also* Exhibit B – July 8, 2004 letter from ABS to USAC; Exhibit C June 8, 2004 letter from USAC to ABS; Exhibit D FCC Form 499Q dated July 29, 2003; Exhibit E FCC Form 499Q dated October 28, 2003.

2. Since 1997, ABS has consistently qualified for the “international exemption” for computation of its USF fees because its international revenue exceeds its interstate revenue by a ratio of 88 to 12.² Since its inception, ABS has consistently filed accurate Telecommunications Reporting Worksheets and paid its Universal Fund contributions (“USF”) in a timely manner.

3. Prior to April 1, 2003, the Commissions rules specified that a company must base its USF contribution payments on actual revenues received and, if there was an error, could true-up their payment record with a corrected FCC Form 499-Q (“499-Q”) within 90 days of the timely filed 499-Q. After April 1, 2003, the Commission’s Contribution Rules³ changed in two key areas that affect ABS: first, the contribution assessment is now based on estimated projected collected revenues rather than actual collected revenues; and second, the time to file an amended 499-Q was reduced from 90 to 45 days.⁴

4. A representative sample of ABS’ invoices from USAC for the year 2003 and 2004 clearly indicate the discrepancy in contributions due the clerical error which is the basis for this Petition:

2003	Contributions
September	\$2,649.82
October	\$1,006.71
November	\$1,016.71
December	\$1,006.71
2004	
January	\$66,700.72
February	\$54,697.82

² See 47 C.F.R. § 54.706(c): Prior to April 1, 2003, any entity required to contribute to the federal universal service support mechanisms whose interstate end-user telecommunications revenues comprise less than 12 percent of its combined interstate and international end-user telecommunications revenues shall contribute to the federal universal service support mechanisms for high cost areas, low-income consumers, schools and libraries, and rural health care providers based only on such entity's interstate end-user telecommunications revenues, net of prior period actual contributions.

³ 47 C.F.R. § 54.706 Contributions.

⁴ 47 C.F.R. § 54.709(a).

March	\$67,680.91
April	\$1,864.38
May	\$2,531.72

ABS prepared and timely filed its 4th Quarter 499-Q, however, an inadvertent typographical error resulted in the misplacement of the decimal point in the \$40,000.00 interstate revenue projection, thus causing the figure to be reported as \$400,000.00. As a result of this clerical error, when USAC calculated ABS' contribution obligation for the 1st Quarter of 2004, ABS "lost" its international exemption. With the loss of the exemption, from January through March, ABS was billed for a total of \$193,000.00 in purported USF contributions - a stark contrast to ABS' normal contribution level of approximately \$6,000.00 for a historically representative three month period.

5. The obvious error in ABS' November 499-Q was not identified by either NECA or USAC, despite its glaring inconsistency with ABS' long history of 499 reporting.

6. Immediately upon discovery of this error, ABS filed a revised Form 499-Q on January 29, 2004. Nonetheless, the revised form was twice rejected by USAC decisions⁵ on the basis that ABS submitted its revised 499-Q outside of a 45-day "revision window" set forth in the instruction manual.⁶

7. USAC decided that ABS would be made whole when the annual true-up occurs because it would "receive adjustments or credits, as appropriate, on its invoices beginning in mid-2005." However, the "true-up" will not occur until April of 2005 and credits will not be issued until July 2005. And then, credits will be issued over the course of three invoices, meaning ABS will not be made whole until mid-September 2005. This is an incredible hardship

⁵ See "Administrator's Decision on Contributor Appeal," September 13, 2004. Exhibit A.

⁶ *Id.* at 2.

for any company let alone a small company such as ABS. The USAC decision simply does not represent an equitable remedy.

8. The Commission's Rule, 47 C.F.R. 54.711(a) provides that the "Commission or the Administrator may verify any information contained in the Telecommunications Worksheet." Certainly, where a provider's contribution is so radically different from its previous filings, as is the case here, the Administrator should have flagged the ABS filing. Just as ABS is required to operate in good faith, so too should USAC.

STATEMENT OF THE ISSUES FOR REVIEW

9. ABS respectfully requests the Bureau consider the following issues for review:

A. That USAC's decision rejecting ABS' December 29, 2003 499-Q revision for an innocent and obvious scrivener's error created an undue burden on ABS;

B. That USAC's refusal to refund the \$193,000 overpayment of USF contributions is a violation of the Communications Act 47 U.S.C. 254 (b)(4) – "Equitable and Nondiscriminatory Contributions";

C. That USAC's "policy" of refusing to promptly refund overpayments when a request for such refund is made outside the 45-day 499-Q revision window set forth in the 499-Q instruction manual, but which is neither required by statute nor set forth in a properly promulgated Commission rule or decision, is *ultra vires* in violation of Commission rule 54.702(d), 47 C.F.R. § 54.702(d); and

D. That USAC's "policy" of withholding overpayments of contributions pending an annual true-up of USF obligations for 2004 is *ultra vires* and constitutionally infirm in violation of the 5th Amendment to the United States Constitution.

LEGAL ANALYSIS

I. That USAC's decision rejecting ABS' December 29, 2003 499-Q revision for an innocent and obvious scrivener's error created an undue burden on ABS.

10. Rule 54.713 directs USAC to "refund any overpayments made by the contributor." Neither Rule 54.713 nor any other properly promulgated Commission rule or decision authorizes USAC to withhold overpayments for any period of time where such overpayment is the result of a clearly demonstrated typographical error.

11. When the Commission appointed USAC as a permanent administrator of the federal Universal Service support mechanisms, the Commission specifically delineated USAC's functions and responsibilities in regards to billing, collection and disbursement authority:

"The Administrator shall be responsible for billing contributors, collecting contributions to Universal Support Mechanisms, and disbursing Universal Support Funds."

47 CFR § 54.702(b)

12 In addition, the Commission authorized USAC to make refunds:

"Once a contributor complies with the Telecommunications Reporting Worksheet filing requirements, the Administrator may refund any overpayments made by the contributor, less any fees, interest, or costs."

47 CFR § 54.713

13. USAC's denial of ABS' appeal lacks rationality because it is applied only to late-filed Form 499 revisions that "have the effect of reducing contributors' USF obligations." *Id.* ABS's revised 499-Q will not reduce its USF contributions because it does not owe the amount of the contribution that was erroneously made in the first instance. Hence, USAC's ruling here is not consistent with the policy it says it "has consistently followed." *Id.*

II. That USAC's refusal to refund the \$193,000.00 overpayments of USF contributions is a violation of the Communications Act 47 U.S.C. 254 (b)(4) – "Equitable and Nondiscriminatory Contributions."

14. The Administrator may not make policy, interpret unclear provisions of the statute or rules, or interpret the intent of Congress. Where the Act or the Commission's Rules are unclear, or do not address a particular situation, the Administrator shall seek guidance from the Commission. 47 CFR § 54.702(d). Here Congress has spoken, requiring that payments into the USF must be equitable and non-discriminatory. It is not equitable to require ABS to pay more than its jurisdictionally appropriate share of USF contributions.

16. Part 54 of the Commission's Rules are silent with respect both to the procedures telecommunications providers must follow to request a refund and those USAC must follow when presented with a *bona fide* refund request. Where the Commission Rules are silent, the Commission must decide in favor of ABS.

III. That USAC's "policy" of refusing to promptly refund overpayments when a request for such refund is made outside the 45-day 499-Q revision window set forth in the 499-Q instruction manual, but which is neither required by statute nor set forth in properly promulgated Commission rule or decision, is *ultra vires* in violation of Commission rule 54.702(d), 47 C.F.R. § 54.702(d).

17. As USAC indicated in its Decision, providers who over report revenue can obtain timely (within approximately 3 monthly billing cycles) "credits" to their USAC accounts by filing a revised Telecommunications Reporting Worksheet (Form 499s) within the revision deadline set forth in Form 499 instructions. However, USAC's application of the revision deadline to deny ABS its refund exceeds not only its authority, but that of the Commission as well, because the 45-day revision deadline is not a validly promulgated Rule. Absent a valid Rule or other statutory authority, USAC's decision to impose any condition on a contributor's

right to a refund for overpayments are beyond its authority and otherwise arbitrary and capricious.

18. Furthermore, USAC's decisions to first reject ABS' December 29, 2003 499-Q revision and then deny ABS' appeal of this rejection are not based on valid delegated authority. USAC's decisions extend beyond its limited discretion and rest on no known statutory provision or duly adopted Commission rule or decision and is thus a violation of the Administrative Procedures' Act to which all Commission policy is subject.

19. The Commission should right this wrong and order the prompt refunding of ABS' \$193,000.00 overpayment, with interest.

IV. That USAC's "policy" of withholding overpayments of contributions pending an annual true-up of USF obligations for 2004 is *ultra vires* and constitutionally infirm in violation of the 5th Amendment to the United States Constitution.

20. It is well-settled, in the analogous context of income tax law, that the timely filing of a claim for refund according to regulations established pursuant to statute is a prerequisite of the existence of a right to sue for the recovery of illegally exacted taxes. *See e.g.*, 26 USCA § 156; *Tucker v. Alexander*, 275 U.S. 228, 48 S.Ct. 45, 72 L.Ed. 253; *J. P. Stevens Engraving Co. v. United States* (C.C.A.) 53 F.(2d) 1; *Snead v. Elmore* (C.C.A.) 59 F.(2d) 312. However, there being no "regulations established pursuant to statute" in the context of the Universal Service program, there can be no arbitrary time bar to a telecommunications providers' ability to request and obtain a refund of excessive USF contributions. This is particularly true when it is proven, as here, that the government has no right to retain funds obtained in error.

21. A citizen's right to refund of overpayments to the government is well settled. In *Fox v. Edwards*, 287 F.669 (2d Cir. 1923), it was held that if it appears that an amount has been paid in income taxes in excess of that properly due, the amount shall be credited upon any tax

then due, and “any balance of such excess shall be immediately refunded to the taxpayer.” *Id.* at 670 (emphasis added).

22. Through its reliance on a 499-Q revision deadline that can only be found in an instruction manual and not in any validly promulgated Rule, USAC acted in violation of express Commission Rules⁷ that direct USAC to refund overpayments. In doing so, USAC has created and followed policies for which it has no authority and thereby deprived ABS of its property by wrongfully withholding significant funds that are not owed to the government and that are needed in the prudent and responsible management of ABS’ operations.

23. There is no legitimate governmental purpose in holding ABS’ \$193,000.00 overpayment. In *Penn Central Transportation Co. v. New York City*,⁸ the Court developed three factors in assessing a takings effect by a government regulation:

- a) The character of the governmental action;
- b) The economic impact of that action; and
- c) The action’s interference, if any, with investment backed expectations.

24. Clearly, were the Bureau to use the *Penn Central Factors* to weigh the actions of USAC against the economic burden imposed on ABS, it could not help but conclude that a continued failure to refund ABS’ overpayment is not only unjust but a taking of property prohibited under the Constitution of the United States.

25. USAC’s deprivation of ABS’ property has been done without due process of law and is therefore in violation of ABS’ constitutional rights as guaranteed by the 5th Amendment to the Constitution.⁹

⁷ See *Bell Atlantic Co. v. FCC*, 24 F. 3d 144, 1445-47 (D.C. Cir. 1994).

⁸ 438 U.S. 104 (1978).

26. USAC received nearly \$200,000.00 to which it is not entitled and which all parties agree will eventually be returned to ABS, but only after many months (approximately July to September of 2005).

27. By retaining the monies to which it is clearly and concededly not legally entitled, USAC not only deprives ABS of cash which is critically important to its on-going operations and monthly obligations, but also needed to maintain existing service and expand its business.

28. Immediate return of the \$193,000.00 over-contribution is necessary from a corporate housekeeping and financial accounting perspective because these funds must be accounted for at the end of 2004 according to generally accepted accounting principles. Waiting until July to September of 2005 is simply not an acceptable option.

⁹ USAC defends its decisions on the basis that ABS' revisions were "not filed prior to the revision deadlines" by reference to the instructions for FCC Form 499-Q. USAC's reliance is misplaced. The instructions may serve as guidelines by informing contributors what time frames are contemplated in making the required filings. But they cannot be used to override ABS' substantive rights because they are not a valid regulation. The FCC Form 499-Q instructions were never subjected to notice and comment as required under the Administrative Procedures Act, 5 U.S.C. 552 (APA). More importantly, the consequences of not complying with these instructions or USAC's policies applied in such circumstances were never subjected to the notice and comment period required by the APA. Indeed, the instructions to the worksheets for the years 1998-2000 do not even mandate that a contributor file a revised worksheet in any time period. In fact, these instructions state only that a contributor must file the revised worksheet if it discovers an error in the data that it reports, but do not specify any time period for filing a revised report requesting a refund.

STATEMENT OF RELIEF REQUESTED

29. As a matter of right and equity, ABS' overpayment must be refunded immediately. USAC's wrongful actions have deprived ABS of its property. ABS has an unqualified general right to have the government return its overpayment and a specific right to have its USF contributions overpayment returned in a timely manner.

30. ABS requests the Commission take such action as is necessary and proper to direct USAC to issue a refund, as required by 47 C.F.R. 54.713, evidencing ABS' overpayment of \$193,000.00 not later than December 31, 2004.

31. ABS additionally requests that it receive the time value of its money wrongfully held by USAC.

Respectfully submitted,
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FCC Filer 499-ID # 815865

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